Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 27 September 2012 [1]

Joined Cases C-356/11 and C-357/11

O (C-356/11),
S
v
Maahanmuuttovirasto
and
Maahanmuuttovirasto (C-357/11)
v
L

(References for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(Citizenship of the Union — Right to family reunification — Applicability of the principles set out in Ruiz Zambrano — Sponsor who is the parent of a child with Union citizenship born of a previous marriage — Right of residence of the sponsor's new spouse, a third-country national — Refusal on the basis of a lack of sufficient resources — Right to respect for family life — Obligation to take into consideration the interests of minor children)

1. Can a third-country national's right of residence in a Member State be derived from the Union citizenship of a child of which he is not the parent but the step-parent?

2. That is, in essence, the question posed by the Korkein hallinto-oikeus (Finland) in two references for a preliminary ruling.

3. Those references are made in the context of disputes between the Maahanmuuttovirasto (Immigration Office) and S, a Ghanaian national (C-356/11), and L, an Algerian national (C-357/11). [2] The sponsors in both cases seek a residence permit for their respective spouses, O and M, both third country nationals, [3] on the basis of the right to family reunification laid down by Directive 2003/86/EC. [4] The Maahanmuuttovirasto rejected the applications on the ground that the applicants did not have sufficient means of subsistence for the purposes of their stay on Finnish territory.

4. The referring court questions the conformity of such decisions with the principles set out by the Court of Justice in *Ruiz Zambrano* [5] and its interpretation of the provisions of the TFEU relating to citizenship of the European Union. Both S and L have sole custody of a child, born of a previous marriage, who is a Union citizen. Consequently, the referring court poses the questions as to whether,

1 — Original language: French.
2 — Collectively, the 'sponsors'.
3 — Collectively, the 'applicants'.
4 — Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).
5 — Case C-34/09 [2011] ECR I-1177.

given the circumstances of the concerned parties' family situations, the Maahanmuuttovirasto was not required to grant the residence permits to the applicants in order to avoid a situation in which the children, in the sole custody of the sponsors, would be forced to leave the territory of the European Union and therefore deprived of the enjoyment of the rights conferred upon them as Union citizens.

5. The referring court's questions therefore call on the Court to specify the scope of the principles set out in *Ruiz Zambrano*, in the particular context of a reconstituted family in which the applicant has no parental or financial responsibility over the child who is a Union citizen.

I – Law

A – *European Union legislation*

1. The Charter of Fundamental Rights of the European Union

6. Pursuant to Article 7 of the Charter of Fundamental Rights of the European Union,[6] everyone has the right to respect for his or her private and family life.

7. Moreover, as provided in Article 24(2) of the Charter, the child's best interests must be a primary consideration in all actions which concern it, whether taken by public authorities or private institutions. In accordance with Article 24(3) of the Charter, every child has the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests.

2. Directive 2003/86

8. Directive 2003/86 determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. The second recital in the preamble states that the directive respects fundamental rights, in particular the right to respect for family life enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[7] and in the Charter.

9. Article 4 of Directive 2003/86 defines those family members of the sponsor who may be entitled to a residence permit on that basis, including, pursuant to Article 4(1)(a) of the directive, the sponsor's spouse.

10. As regards the examination of applications for family reunification, the legislature of the European Union requires, pursuant to Article 5(5) of Directive 2003/86, that Member States have due regard to the best interests of minor children. Under Article 17 of the directive, where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family, they must also take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin.

6 — 'The Charter'.

7 — Convention signed in Rome on 4 November 1950 ('the ECHR').

11. Nevertheless, Member States have a degree of flexibility in the implementation of the requirements for the exercise of the right to family reunification. Accordingly, pursuant to Article 7(1)(c) of Directive 2003/86, the Member State may require that the sponsor have stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.

B – *Finnish legislation*

12. Pursuant to Paragraph 37(1) of the Law on foreigners (Ulkomaalaislaki), the spouse of a person living in Finland is regarded as a family member.

13. Under Paragraph 39(1) of that Law, a residence permit is granted on condition that the foreigner has sufficient means of subsistence. The competent authorities may, nevertheless, make an exception to that condition if there is an exceptionally serious reason for doing so or if the best interests of the child demand it.

14. Finally, in accordance with Paragraph 66a of that Law, if a residence permit is sought on the basis of family ties, the competent authorities must, in their examination, have regard to the nature and solidity of the foreigner's family ties, the duration of his residence in the Member State concerned, and his family, cultural, or social ties to his country of origin.

II – The facts in the main proceedings

A – *Case C-356/11*

15. S is a Ghanaian national who resides in Finland under a permanent residence permit. On 4 July 2001, she married a Finnish national, with whom she had a child, born on 11 July 2003. That child, as a Finnish national, is a citizen of the Union. Nevertheless, he has never exercised his right to freedom of movement. S was granted sole custody of the child from 2 June 2005, and her previous marriage was ended by divorce on 19 September 2005. The father of the child lives in Finland. The decision to refer notes that that S, during her stay in Finland, has studied, received maternity leave, followed a training programme, and been in gainful employment.

16. On 26 June 2008, S married O, an Ivory Coast national. On the basis of that marriage, O submitted an application for a residence permit to the Maahanmuuttovirasto. A child of Ghanaian nationality was born of the marriage on 21 November 2009, of whom the parents have joint custody. O shares the home of S and her two children. The decision to refer notes that on 1 January 2010 O signed a contract of employment for a period of one year, under which the regular working hours were eight hours a day and the pay EUR 7.50 an hour. However, he did not produce evidence proving that he actually worked in accordance with that contract.

17. By its decision of 21 January 2009, the Maahanmuuttovirasto rejected O's application for a residence permit on the basis of the first sentence of Paragraph 39(1) of the Law on foreigners, finding that O did not have sufficient means of subsistence. Moreover, it did not find it necessary to depart from that condition, as permitted by that Law in the event of exceptionally serious circumstances or if the best interests of the child demand it.

18. Subsequently, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) (Finland), dismissed the action for annulment brought against that decision. O and S then appealed that judgment before the referring court.

B – *Case C-357/11*

19. Case C-357/11 is very similar to Case C-356/11, since the connection between the child with Union citizenship and the applicant is also that of a reconstituted family. However, the facts in the main proceedings differ as regards, inter alia, the current place of residence of the applicant.

20. In this case, L is an Algerian national with a permanent residence permit obtained on the basis of her marriage with a Finnish national. A child with Finnish nationality was born of that marriage, who has never exercised his right to freedom of movement. Following her divorce of 10 September 2004, L obtained sole custody of the child. The father of the child lives in Finland.

21. On 19 October 2006, L married M, an Algerian national. M arrived legally in Finland in March 2006, where he requested political asylum and where, according to his statements, he lived together with L from April 2006. In October 2006, M was returned to his country of origin. On 29 November 2006, L applied to the Maahanmuuttovirasto for a residence permit for M, on the basis of their marriage and, on 14 January 2007, L gave birth to a child of Algerian nationality, who is in the joint custody of the couple. It has not been established that M has met this child.

22. The decision to refer notes that L has never been in gainful employment during her stay in Finland and that her means of subsistence are based on subsistence support and other benefits.

23. For the same reasons as those set out in the examination of O's application for a residence permit in Case C-356/11, the Maahanmuuttovirasto rejected M's application for a residence permit. However, that decision was annulled by the Helsingin hallinto-oikeus, which led the Maahanmuuttovirasto to bring an appeal against that judgment before the referring court.

24. In the present references for a preliminary ruling, the referring court raises a question as to the applicability of the principles set out by the Court in *Ruiz Zambrano*. It asks whether, given the Maahanmuuttovirasto's refusal to grant a residence permit to the applicants, their spouses and the children in the custody of those spouses will not, in reality, be forced to leave the territory of the Union in order to live together.

III – Questions referred

25. It is in that context and in order to remove its doubts that the Korkein hallinto-oikeus decided to stay the proceedings and to refer to the Court of Justice the following questions, the first of which are worded identically.

— In Case C-356/11:

> '(1) Does Article 20 TFEU preclude a third-country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third-country national is not the child's parent or carer and does not have custody of the child?
>
> (2) If the answer to Question 1 is in the negative, must the effect of Article 20 TFEU be assessed differently if the third-country national who does not have a residence permit, his spouse, and the child who is in the custody of the spouse and has Union citizenship live together?'

— In Case C-357/11:

‘(1) Does Article 20 TFEU preclude a third-country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third-country national is not the child’s parent, does not have custody of the child, and does not live with his spouse or with the child?

(2) If the answer to Question 1 is in the negative, must the effect of Article 20 TFEU be assessed differently if the third-country national who does not have a residence permit, and does not live in Finland, and his spouse have a child, in their joint custody and living in Finland, who is a third-country national?’

26. Observations have been submitted by the parties to the main proceedings, the Danish, German, Italian, Netherlands, and Polish governments, and the European Commission.

IV – Analysis

27. By its first questions, the referring court asks, in essence, whether the treaty provisions relating to Union citizenship must be interpreted as meaning that they confer on a third-country national a right of residence in the Member State where his spouse, also a third-country national, and the child of that spouse, a Union citizen born of a previous marriage, legally reside, despite the applicant’s lack of sufficient means of subsistence.

28. That question invites the Court to define the scope and limits of the principles set out in *Ruiz Zambrano* in the particular context of a reconstituted family in which one of the parents has sole custody of a child with Union citizenship, born of a previous marriage.

29. The question is whether, in the light of that case-law, the Member State is required to grant the applicant a residence permit even though he is not the parent of the child with Union citizenship and exercises no parental responsibility over that child, to avoid the risk of forcing the new family to leave the territory of the European Union and, consequently, depriving the child, in the words of the Court, ‘of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen’.

30. If the Court finds that the Member State is not required to grant such a residence permit, the referring court asks, by its second question, whether those treaty provisions should be interpreted differently given the circumstances of each of the applicants’ family situation. In Case C-356/11, the applicant, his spouse, and the child with Union citizenship live together in Finland. By contrast, in Case C-357/11, the applicant returned to his country of origin but has, with his spouse, a child of third-country nationality, who lives in Finland and is under the joint responsibility of both his parents. [8]

31. I will examine those questions in the light of not only the treaty provisions relating to Union citizenship, in particular Article 20 TFEU, but also Directive 2003/86.

8 — That is also the case in Case C-356/11.

32. In contrast, I will not analyse those question from the perspective of the provisions relating to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, covered by Directive 2004/38/EC,[9] since that directive is, in my view, not applicable.

33. It is settled case-law that it is not all third-country nationals who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of Article 2(2) of that Directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.[10] Indeed, as the Court recently reiterated in *Dereci and Others*,[11] a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him. In those circumstances, his family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family.[12]

34. In the present case, the Union citizens, namely the respective children of S and L, have never exercised their right of free movement and have always resided in Finland, the Member State of which they are nationals. I am therefore of the opinion, as, moreover, the Commission stressed in its observations, that they are not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that the directive is not applicable to them or the members of their families.

A – *Applicability of the provisions of the treaty relating to citizenship of the Union*

35. First, it must be noted that, as nationals of a Member State, the respective children of S and L enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against the Member State of which they are nationals.

36. It is on the basis of that provision that the Court, in *Ruiz Zambrano*, found, in essence, that national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union are precluded.[13]

37. In that case, the Court was asked to specify whether a Member State's refusal to grant a residence and work permit to a third-country national would have such an effect where that person was responsible for the care of his young children, who, as nationals of that Member State, were citizens of the Union. The Court found that such a refusal would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents, which would, in fact, deprive the children of the ability to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.[14]

38. I am of the view that those principles cannot be transposed to situations such as those at issue in the main proceedings.

9 — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

10 — Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 73.

11 — Case C-256/11 [2011] ECR I-11315.

12 — Paragraphs 53 to 56 and the case-law cited.

13 — Paragraph 42.

14 — Paragraphs 43 and 44.

39. The cases in the main proceedings are significantly different from the *Ruiz Zambrano* case.

40. It is clear from the documents before the Court that the applicants are not the parents of the young children who are Union citizens. They exercise no parental authority over those children and do not provide for them. The children are under the exclusive responsibility of their mothers, who are, consequently, the sole providers for their maintenance and education. Accordingly, the decisions of the Maahanmuuttovirasto rejecting the applicants' respective applications for residence permits do not deprive the Union citizens of their fathers or of their means of subsistence, since those means are provided by their mothers, who have sole custody of the children, and who, it is recalled, have permanent residence permits in Finland.

41. Admittedly, it is possible that S and L might choose to follow their respective spouses to their countries of origin in order to preserve the unity of their family life. The fact that their children have Union citizenship cannot amount to putting them 'under house arrest' in the territory of the European Union, when they have been invested with full parental authority by the judicial authorities of the Union itself.

42. In any event, if they chose to leave – which in my view seems unlikely, particularly in Case C-357/11, for reasons set out below –, the young children who are Union citizens would indeed have no other choice but to leave the territory of the Union and, consequently, lose the enjoyment of the rights conferred on them as citizens of the Union. However, in my view, departure from the territory of the Union would be freely decided by their mother for a reason linked to the preservation of family life and would not be imposed under the implementation of national legislation.

43. If we refer to the principles set out by the Court in *Dereci and Others*, it does not seem to me that such a reason can suffice to constitute a breach of Article 20 TFEU. In that case the Court gave a particularly restrictive interpretation of the criteria set out in *Ruiz Zambrano*. In paragraph 68 of its analysis, it specified, in particular, concerning a Union citizen, that the mere fact that it might appear desirable to him, for economic reasons or in order to keep his family together, for a member of his family who is a third country national to obtain a residence permit is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

44. The reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case-law of the Court. They concern situations in which the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs.

45. Those situations may concern parents who are third-country nationals, on whom young children who are citizens of the Union are dependent, as in *Ruiz Zambrano*. They might also concern adult children on whom a parent is dependent because of an illness or a disability. However, they do not concern third-country nationals who exercise no responsibility, either parental or financial, over the Union citizen. Indeed, if that was the case, we would risk founding a right of residence for third country nationals on the sole basis of Article 20 TFEU and outside the provisions of secondary law expressly provided for by the Union legislature in, inter alia, Directive 2003/86.

46. I do not think that it is necessary to modify that assessment in the light of the particular circumstances referred to by the referring court in its second questions.

47. With regard to Case C-356/11, the family situation of the applicant is characterised by the fact that he lives in Finland together with his spouse and her child.

48. Obviously, those circumstances do not establish parentage between the applicant and the Union citizen and do not change the conclusion that, despite the cohabitation of the couple, only the mother of the child with Union citizenship, inasmuch as she has sole custody of the child and is gainfully employed, provides for his subsistence. It must be noted, in this respect, that the applicant has not shown that he is actually in gainful employment.

49. As regards Case C-357/11, the family situation of the applicant is characterised by the fact that he was returned to his state of origin and has, with his spouse, a child who is a third-country national residing in Finland and in the joint custody of both his parents.

50. In my view, that cannot have any effect on the proposed interpretation of Article 20 TFEU since, as it concerns the presence of another child who is a third-country national, it is not relevant to the status of the child who is a citizen of the Union.

51. It is true that the presence of the second child is liable to influence the mother's decision to follow her spouse to his state of origin, hence forcing the child with Union citizenship to leave the territory of the Union. However, as we have indicated, such a consequence would arise from the deliberate decision of the mother and would not be imposed by the implementation of the national legislation.

52. The facts in Case C-357/11 demonstrate that particularly well. It is clear from the documents before the Court that the applicant has never met his child. In other words, since the applicant's return to his state of origin, L, the mother of the child with Union citizenship, has never gone to Algeria to see her spouse or to present him his child. Likewise, even though his removal does not seem to have been combined with a prohibition on entry, the applicant did not find it necessary to visit the members of his family in Finland. Given that L has lawfully resided in Finland for 9 years, during which time she gave birth to a child of Finnish nationality, that she has a permanent residence permit and income there, and that she only lived with her spouse for the relatively brief period of seven months, it is not obvious that she would choose to rejoin her spouse in his state of origin, thereby forcing the child with Union citizenship to leave the territory of the Union. Whether the latter is deprived of the substance of the rights conferred on him by virtue of his status as a citizen of the Union therefore depends, above all, on the whims and vagaries of his mother's married life rather than a constraint imposed by the implementation of the national legislation.

53. In light of those elements, I believe, in consequence, that Article 20 TFEU must be interpreted as not precluding the refusal by a Member State to grant a residence permit to a third-country national because he does not have sufficient means of subsistence, where that national intends to reside with his spouse, a third-country national residing lawfully in that member state, and a child with Union citizenship, born of a previous marriage of the spouse.

54. I am also of the opinion that it is not necessary to interpret that provision differently where, in circumstances such those in the main proceedings, the third-country national lives together with his spouse and the latter's child in the territory of the Member State concerned. Nor is it necessary to interpret that provision differently where the third-country national has returned to his country of origin but has, with his spouse, a child who is a third-country national who resides in the Member State concerned and is under the joint responsibility of both parents.

55. However, that does not affect the issue of whether a residence permit should be granted to the applicants on the ground of the law relating to the protection of family life and, in particular, the right to family reunification laid down in Directive 2003/86. The residence permits applied for in the main proceedings have the aim of allowing the reunification of third-country nationals with their

spouses, who have a permanent right of residence in that Member State, and their child.[15]

B – *The right to family reunification*

56. The conditions in which a third-country national lawfully residing in the territory of a Member State may exercise his right to family reunification are set out in Directive 2003/86. That directive is applicable where that national holds a residence permit issued by a Member State for a period of validity of one year or more, he has reasonable prospects of obtaining the right of permanent residence, and the members of his or her family are third-country nationals.

57. All of those conditions are met in the main proceedings, since the sponsors, of Algerian and Ghanaian nationality, respectively, hold permanent residence permits in Finland and request the grant of residence permits in favour of their spouses, third-country nationals, in order to maintain family unity.

58. Consequently, Directive 2003/86 is applicable to the parties concerned.

59. Authorisation of family reunification is, according to the Court, the general rule.[16] Nevertheless, the Member States may make the granting of that authorisation subject to a certain number of conditions, set out in Articles 6 to 8 of that Directive. Member States may require, inter alia, in accordance with Article 7(1)(c) of the Directive, that the sponsor prove he has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned.

60. It is on the basis of that provision and, in particular, of Paragraph 39(1), of the Law on foreigners, that the Maahanmuuttovirasto rejected the applications of S and L seeking the recognition of a right to family reunification. Moreover, it found that it was not necessary to depart from the principle laid down in that provision, considering that the circumstances were not exceptionally serious and that the best interests of the children did not require it.

61. In the light of the principles set out in Directive 2003/86 and the case-law of the Court, it seems important, in my view, that the referring court make sure that the decisions of the Maahanmuuttovirasto were adopted in the respect of the family life of S and L and, in particular, that the best interests of the children concerned were taken into consideration.

62. It is true that the Court acknowledges that the Member States have a certain margin of appreciation when they examine applications for family reunification[17] and, in particular, when they implement the criteria set out in Directive 2003/86.

63. Nevertheless, as regards the criteria defined in Article 7(1)(c) of that directive, the Court has ruled, in *Chakroun*, that that provision must be interpreted strictly so as not to undermine the objective of the directive, which is to promote family reunification, or its effectiveness.[18] Moreover, the Court has held that the Member States must exercise their margin of appreciation in the light of the right to respect for family life which is enshrined in Article 8 of the ECHR and which is guaranteed in the

15 — It is settled case-law that, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may also deem it necessary to consider provisions of European Union law to which the national court has not referred in its question (see, in that respect, judgment of 19 April 2012 in Case C-461/10 *Bonnier Audio,* paragraph 47 and the case-law cited there).

16 — Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 43.

17 — Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 59.

18 — *Chakroun* (paragraph 43).

same words in Article 7 of the Charter.[19] The Court referred, in that respect, to the second recital in the preamble to Directive 2003/86 whereby the legislature of the Union requires that measures concerning family reunification be adopted in conformity with the obligation to protect the family and respect family life enshrined in those provisions.

64. What does that mean in practice for the assessment carried out by the national court?

65. In order to answer that question, it is useful to recall the analytical approach adopted by the European Court of Human Rights on which our case-law, to a great extent, is based.

66. The European Court of Human Rights has found that the right to respect for family life does not guarantee, in general, a right to choose the most suitable place to develop family life.[20]

67. Furthermore, it has held that the ECHR does not guarantee, in itself, any right for an alien to enter or reside in a particular country, that States have the right to control the entry of aliens into their territory, subject, of course, to their international treaty obligations. Moreover, in the area of immigration, the European Court of Human Rights has found that States are not required to respect the choice, by married foreign nationals, of their common residence and to allow the unification of the family on their territory.[21]

68. It recognises, nevertheless, that the decision of a State adopted in the area of immigration and family reunification may amount to an infringement of the right to respect for family life, in particular where that decision involves the removal of a person from a country where close members of his family are living.[22]

69. Consequently, the European Court of Human Rights requires that the decision at issue be adopted in accordance with the requirements laid down in Article 8(2) of the ECHR. Accordingly, in a case-by-case analysis, it examines whether that decision was 'in accordance with the law', pursued a legitimate aim, such as maintaining public order, and was 'necessary in a democratic society', and proceeds to carry out a test of proportionality.

70. The crux of its analysis consists in whether, in each case, a fair balance has been struck between the public interest, the interests of the couple and, as the case may be, those of the child.

71. In its analysis, the European Court of Human Rights examines numerous factors, linked to the individual and family situation of each of the parties concerned.

72. As regards the applicant, it takes into consideration his nationality and the nature of his social, cultural, and family ties with his host State and his country of origin. It also takes into consideration, as the case may be, the length of his marriage, the birth of legitimate children, and any other factors revealing whether the couple lead a real and genuine family life. With regard to the spouse, the European Court of Human Right is attentive to the nature and seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.[23]

19 — *Parliament* v *Council* (paragraph 52).

20 — Eur. Court H. R., *Ahmut v. The Netherlands,* 28 November 1996, § 71, *Reports of Judgments and Decisions* 1996-VI.

21 — See Eur. Court H. R., *Gül v. Switzerland*, 19 February 1996, § 38, Reports of Judgments and Decisions 1996-I; *Ahmut v. The Netherlands* § 67; and *Sen v. The Netherlands*, No. 31465/96, § 36, 21 December 2001. See also, more recently, Eur. Court H. R., *Bajsultanov v. Austria*, No. 54131/10, § 78 and the case-law cited, 12 June 2012.

22 — See, inter alia, Eur. Court H. R., *Boultif v. Switzerland,* No. 54273/00, § 39 and the case-law cited, ECHR 2001-IX, and *Bajsultanov v. Austria,* § 78 and the case-law cited.

23 — See Eur. Court H. R. *Boultif v. Switzerland*, § 48, and *Nunez v. Norway*, No. 55597/09, § 70, 28 September 2011.

73. In balancing the different interests, the best interests of the child constitute the decisive consideration and may, depending on their nature and seriousness, take precedence over the interests of the parents. [24] The child's best interests require that the ties between him and his family must be maintained. In consequence, the European Court of Human Rights considers that only exceptional circumstances may lead to a severing of the family ties and that everything must be done to preserve personal relations and family unity or to 'rebuild' the family. [25]

74. In that respect, the European Court of Human Rights takes into consideration several individual circumstances connected to the child in order to best determine his interest and ensure his well being. It has regard to, inter alia, his age, his maturity, and his degree of dependence on his parents, and takes due account, in that respect, of the presence or the absence of those parents. It also takes due account of the environment in which he lives and the situation in the country of origin of the parent concerned in order to assess the difficulties which he might encounter there. [26]

75. It is by taking all those factors into consideration and weighing them against the general interest of the State that the European Court of Human Rights assesses whether that State has, in its decision, struck a fair balance and respected the provisions of Article 8 of the ECHR.

76. In the implementation of Directive 2003/86, the Member States are also required to balance the various interests at issue, taking into account, in particular, the interests of the child. The Court has expressly acknowledged this in *Parliament* v *Council*, referring to a great extent to the case law of the European Court of Human Rights concerning compliance with Article 8 of the ECHR. [27]

77. It should be recalled that the right to the respect for private and family life is guaranteed in Article 7 of the Charter, in the same terms as Article 8(1) of the ECHR, which means, under Article 52(3) of the Charter, that the meaning and the scope of that right must be determined by taking account of the case-law of the European Court of Human Rights in that regard. [28]

78. It should also be recalled that, according to the Court's case-law, the right to respect for private and family life guaranteed in Article 7 of the Charter must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter. [29] In other words, and in accordance with the requirements of that provision, the Member States must make the best interests of the child a paramount consideration when, acting through public or private authorities, they issue a legislative act relating to children. That requirement is expressly recalled in Article 5(5) of Directive 2003/86. The Member States must, moreover, ensure that the child may maintain personal relations and direct contact with both parents on a regular basis. [30]

24 — Concerning the best interests of the child in the case-law of the European Court of Human Rights, see, in particular, Eur. Court H. R., *Neulinger and Shuruk v. Switzerland [GC]*, No 41615/07, §§ 49 to 64, ECHR 2010.

25 — Ibid, § 136 and the case-law cited.

26 — See Eur. Court H. R., *Şen v. The Netherlands*, § 37, and *Rodrigues da Silva and Hoogkamer v. The Netherlands*, No. 50435/99, § 39, ECHR 2006-I, and the UNHCR *Guidelines on Determining the Best Interests of the Child*, published by the United Nations High Commission for Refugees (UNHCR) in May 2008, available at http://www.unhcr.org/4566b16b2.html.

27 — Paragraphs 62 to 66 and the case-law cited.

28 — C-279/09 *DEB* [2010] ECR I-13849, paragraph 35.

29 — *Parliament* v *Council*, paragraph 58.

30 — The rights enshrined in the Charter are directly inspired by the rights enshrined in the Convention on the Rights of the Child adopted on 20 November 1989 which entered into force on 2 September 1990, *United Nations Treaty Series*, Vol. 1577, p. 3. See, inter alia, Article 3(1), Article 9(1) and (3), and Article 10 of that Convention.

79. In the light of those elements, I believe that it is for the national court to assess whether, in the implementation of the criteria defined by Directive 2003/86 and within the limits of the Member State's margin of appreciation in that area, the competent national authority has carried out a fair and balanced assessment of each party's respective interests, seeking, in particular, to respect the family life of the concerned parties and to determine the best solution for the child. In that context, it must carry out an in-depth examination of the entire family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature.

80. I wish, nevertheless, to make a few observations concerning the situation of the parties concerned in each of the present cases.

81. In Case C-356/11, the issue of the 'continuation' of the family life in Finland arises, since the applicant lives with the sponsor, their child and the child with Union citizenship.

82. Admittedly, the applicant has not shown that he is in gainful employment of a sort capable of providing him with sufficient income to satisfy the condition set out in Paragraph 39(1) of the Law on foreigners. Nevertheless, it must be asked whether the rejection of his application and the establishment of his family in the Ivory Coast would not have too great an impact on the sponsor and her children.

83. First, it is in the interest of the child with Union citizenship to have, to the greatest extent possible, a continuous relationship with his father, who resides in Finland and perhaps has visiting rights – except, of course, if the latter proves to be particularly unworthy.[31] The refusal to grant a residence permit and the family moving to the Ivory Coast would involve, in fact, the severing of that relationship, in so far as it would be more difficult for the parties concerned to maintain regular contact. Moreover, that child has always lived in Finland, in the cultural, social, and linguistic environment of that Member State, and even goes to school there. He therefore has little or no connection with the Republic of the Ivory Coast. Even if he is at an age when the ability to adapt is still great, I think that the national court should take into consideration the difficulties he is likely to face if he is uprooted from his normal environment to live in the applicant's state of origin.

84. In the same way, it is obvious that the best interests of the child of O and S, in particular given his young age, require that he grow up in the family environment and that the relationship between him and his father be maintained.

85. Secondly, it is clear from the documents before the Court that the sponsor has studied, carried out a training course, and been in gainful employment in Finland, so that she has developed not only personal and social connections, but also economic and professional ties in that Member State. Moreover, she has succeeded in obtaining a permanent residence permit. The question is, consequently, whether S must be expected to make a choice between abandoning the situation she has acquired in Finland, thus relinquishing the personal and economic ties which make up her private life, and giving up the company of her spouse with whom she lives together and who constitutes a fundamental element of her family life. In any event, the refusal to grant a residence permit to her spouse will give rise to numerous consequences, firstly, as regards her responsibilities as a mother of the child with Union citizenship, since it is clearly in his interest to remain in Finland; secondly, for her as a spouse of an Ivory Coast national and mother of a second child with Ghanaian nationality, since it is in all of their interests to live together; and, thirdly, as regards her personal and professional situation, since it is certainly in her interest, given the situation she has acquired in Finland, to continue to reside in that Member State.

31 — See General Comment No 17 of the Human Rights Committee concerning Article 24 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the General Assembly of the United Nations, which entered into force on 23 March 1976.

86. In Case C-357/11, by contrast, the issue arises of the 'reunification' of the family, since the applicant no longer lives with the sponsor. That case must be distinguished from the first, in the light of two elements connected with the applicant's material situation.

87. First, it is apparent from the documents before the Court that the applicant lived with his spouse only for a relatively brief period of seven months and that he has never met his child, now five and a half years old. It is true that the applicant was removed from the Finnish territory before the birth of that child. Nevertheless, as I have indicated, it does not seem from the documents before the Court that his removal was accompanied by an order prohibiting him from entering Finnish territory. Consequently, it is questionable to what extent it was not possible for the applicant to visit the members of his family and meet his child. Likewise, according to the same documents, L, though she is an Algerian citizen, holding not only a permanent residence permit in Finland but also financial resources, has never returned to her state of origin to see her spouse again and introduce him to their child. Those elements do not show, in my view, a real desire to live together; nor do they show, on the part of the father, a real desire to meet and care for his child.

88. Secondly, I suspect that the family life of L and M was established and developed at a time when the couple were aware that the situation as regards the rules of immigration was such that their continued family life in Finland was, from the start, precarious in nature.[32] The applicant never obtained a temporary residence permit in Finland and did not satisfy the conditions relating to financial means established by the national legislation. Consequently, both were assuredly capable of foreseeing, to a reasonable degree, that there was a risk that the applicant would be removed and that the continued nature of their family life in Finland was fragile.

89. That being said, I do not have access to all of the elements necessary to carry out a fair balancing of all of the interests at issue, which would clearly require direct contact with the concerned parties, which only the national authorities have.

90. In the light of all of those elements, it will consequently be for the national court to assess whether, in the implementation of the criteria laid down in Directive 2003/86 and within the limits of the Member State's margin of discretion in the area, the competent national authority carried out a fair and balanced assessment of the competing interests at issue, seeking, in particular, to respect the family life of the parties concerned and to determine the best solution for the child. In that context, the national court must carry out an in-depth examination of the family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature.

V – Conclusion

91. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions submitted by the Korkein hallinto-oikeus:

(1) Article 20 TFEU must be interpreted as not precluding a Member State from refusing a third-country national a residence permit because of lack of sufficient means of subsistence, where that national intends to reside with his spouse, a third-country national residing lawfully in that Member State, and a child who is a citizen of the Union, born of his spouse's first marriage.

32 — The European Court of Human Rights has held that, where such is the case, it is only in particularly exceptional circumstances that the expulsion of the family member who does not have the nationality of the host country would constitute a violation of Article 8 ECHR (see Eur. Court H. R., *Rodrigues da Silva and Hoogkamer v. The Netherlands*, § 39 and the case-law cited).

That provision should not be interpreted differently where the third-country national lives together with his spouse and the spouse's child in the territory of the Member State.

Nor should that provision be interpreted differently where the third-country national has returned to his country of origin, but has, with his spouse, a child who is a third-country national, who resides in the Member State concerned and is in the joint custody of both parents.

(2) However, it is for the national court to examine whether, in the implementation of the criteria set out in Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, and within the limits of the Member State's margin of appreciation in the area, the competent national authority carried out a fair and balanced assessment of the competing interests at issue, seeking, in particular, to respect the family life of the parties concerned and to determine the best solution for the child. In that context, the national court must carry out an in-depth examination of the family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature.